

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALLEN REICH,

Defendant-Appellant.

UNPUBLISHED
December 2, 2003

No. 234115
Macomb Circuit Court
LC No. 00-002380-FH

ON REMAND

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court¹ for reconsideration in light of *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003) (*Babcock III*). We adopt our previous holding affirming defendant's convictions of false personation,² representation as a public utility employee, MCL 750.217b, and second-degree criminal sexual conduct (CSC II), MCL 750.420c(1)(c), as well as the sentence for false personation. In addition, in light of *Babcock III*, we again affirm defendant's sentence of ten to fifteen years' imprisonment for his conviction of CSC II.

The facts of this case were succinctly stated in our previous opinion (*People v Reich*, unpublished opinion of the Court of Appeals, issued November 15, 2002, (Docket No. 234115):

This case stems from an incident in July 2000 in which defendant entered the apartment of an eighty-six-year-old woman by posing as a City of Eastpointe water department employee. After showing the victim a tea-colored water sample purportedly taken from her water supply, he told the victim that the water could

¹ *People v Reich*, Order of the Michigan Supreme Court, (Docket No. 122898, issued October 3, 2003). The remand order vacates our previous opinion, however the scope of the remand is limited to the effect of *Babcock II* that applies only to § II of the previous opinion that relates to the sentencing guidelines departure with regard to the CSC II conviction.

² See Michigan Penal Code, Chapter XXXV, False Personation; see also 32 Am Jur 2d, False Personation.

be harmful to her heart. The victim complied with defendant's instruction to lie on her bed and remove her blouse and bra, whereupon defendant manipulated the victim's breasts to perform a "heart check" with a stethoscope.

The trial court departed from the sentencing guidelines of twelve to twenty-four months with regard to the CSC II conviction, and defendant sought resentencing on appeal arguing that the departure constituted an abuse of discretion. We disagreed, relying on *People v Babcock*, 250 Mich App 463; 648 NW2d 221 (2002) (*Babcock II*) and *People v Babcock*, 244 Mich App 64; 624 NW2d 479 (2000) (*Babcock I*). Leave to appeal was granted by our Supreme Court in *Babcock II* resulting in *Babcock III*, which now provides the framework by which we must review the guidelines departure in this case.

As noted in our previous opinion:

In imposing defendant's sentence, the trial court recognized that the sentence must consider the particular circumstances of the case and the defendant, indicating that in this case the Court was satisfied that it had reliable complete, detailed information about defendant. The court stated that it found substantial and compelling reasons for an upward departure from the guidelines and that it concurred with the prosecutor. In stating its rationale for the departure, the court emphasized that the victim was eighty-six-years-old, was unstable in her walking, and had no ability to run from defendant. The court indicated that defendant had an obvious pattern of behavior, which was appalling, and that defendant posed a substantial risk to society, particularly senior citizens.

We also noted that

"[a]lthough a victim's age and inability to escape are considered under offense variable 10 for "exploitation of a vulnerable victim," MCL 777.40(1)(b), in departing from the guidelines, the court cited the appalling nature of defendant's repeated offenses against elderly women and defendant's pattern of behavior, which go beyond the mere fact that the victim in this case was vulnerable. Defendant's history of these similar, repeated offenses was undisputed, notwithstanding the lack of convictions, and was objective and verifiable."

Applying the relevant portions of the framework laid out in *Babcock III*, *supra* at 272-274, we reach the following conclusions:

1. All of the factors relied upon as substantial and compelling reasons for departure were objective and verifiable in that they were uncontested (the victim's advanced age) or confirmed by observation (the victim's physical frailty and inability to escape from the much younger defendant) or confirmed by the record (defendant's prior sexual assaults on elderly women). Moreover, these factors meet the additional test of being substantial and compelling under *Babcock III* because they grab our attention and are of considerable worth in determining the length of the sentence. *Id.*

2. The departure was based on characteristics, which were given inadequate or disproportionate weight in the sentencing guidelines. As we noted in our earlier opinion,

The circumstances in this case and the remarks of the trial court convince us that the court did not base its departure merely on factors already taken into account by the offense variables. *Babcock I, supra* at 79; see also *Armstrong, supra* at 425 (defendant's uncontrollable sexual attraction toward little boys and the need to protect other children not adequately considered by the guidelines).

3. The trial court's recitation of why the substantial and compelling reasons for departure justified the *particular* departure and explanation of the extent of the departure contributes to a more proportionate sentence than provided by the guidelines was based on the obvious pattern of defendant's criminal behavior over a long period of time which poses a clear danger to elderly citizens. *Id.*

4. The trial court did not abuse its discretion in departing from the sentencing guidelines to the extent indicated.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald